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No. 80-1018

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY, - Appellants,

versus

ULYSSES G. WALDEN, JR.,
CAROLYN SALLEE WALDEN, - - Appellees,

LOUISE F. SHORT, - - - - - - Intervenor.

On Appeal from the Supreme Court of Indiana

BRIEF OF APPELLANTS

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THE QUESTIONS PRESENTED FOR REVIEW

This Appeal raises the issue of the constitutionality of an Indiana Statute, Indiana Code 1971, 32-5-11-1 through 32-5-11-8, commonly known as the Indiana Mineral Lapse Act, which statute retroactively provides that a mineral interest severed from the surface is deemed to have lapsed if a use of the mineral interest is not made within twenty years of the severance or if a statement of claim setting forth the ownership of the severed mineral interest is not filed within the statutory period with the recorder in the county in which the property is located. There are four constitutional questions presented for review:

a) Whether the Indiana Mineral Lapse Act constitutes a taking of private property without compensation in violation of the due process clause since no compensation is given to the owner of the severed mineral interest upon the lapse of this interest pursuant to the statute.

b) Whether the Indiana Mineral Lapse Act violates procedural due process protections by failing to provide for any notice or hearing prior to the termination of the mineral interest, or at some meaningful time after the termination of the mineral interest.

c) Whether the Indiana Mineral Lapse Act constitutes an impairment of contract by voiding contractual conveyances of mineral interests, where no overriding public interest justifies the methods used in transferring ownership of the mineral interest.

d) Whether the provision in the Indiana Mineral Lapse Act — which provides that owners of more than ten mineral interests in a county who inadvertently fail to file a statement of claim must be given written notice prior to the lapse of their interest, when similar protection is not provided for owners of less than ten mineral interests in a county — violates the equal protection clause.

THE PARTIES TO THE PROCEEDING

All of the parties to the proceeding are shown in the caption with the exception that the Attorney General for the State of Indiana is also a party to this Appeal.

The present case has also been consolidated by this Court with the case, *Texaco, Inc., et al.* v. *Louise F. Short, et al.*, No. 80-965, which also challenges the constitutionality of the Indiana Mineral Lapse Act.

THE QUESTIONS PRESENTED FOR REVIEW

This Appeal raises the issue of the constitutionality of an Indiana Statute, Indiana Code 1971, 32-5-11-1 through 32-5-11-8, commonly known as the Indiana Mineral Lapse Act, which statute retroactively provides that a mineral interest severed from the surface is deemed to have lapsed if a use of the mineral interest is not made within twenty years of the severance or if a statement of claim setting forth the ownership of the severed mineral interest is not filed within the statutory period with the recorder in the county in which the property is located. There are four constitutional questions presented for review:

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b) Whether the Indiana Mineral Lapse Act violates procedural due process protections by failing to provide for any notice or hearing prior to the termination of the mineral interest, or at some meaningful time after the termination of the mineral interest.

c) Whether the Indiana Mineral Lapse Act constitutes an impairment of contract by voiding contractual conveyances of mineral interests, where no overriding public interest justifies the methods used in transferring ownership of the mineral interest.

d) Whether the provision in the Indiana Mineral Lapse Act — which provides that owners of more than ten mineral interests in a county who inadvertently fail to file a statement of claim must be given written notice prior to the lapse of their interest, when similar protection is not provided for owners of less than ten mineral interests in a county — violates the equal protection clause.

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No. 80-1018

IN THE

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October Term, 1980

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY, - - *Appellants,*

v.

ULYSSES G. WALDEN, JR.,
CAROLYN SALLEE WALDEN, - - - *Appellees,*

LOUISE F. SHORT, - - - - - *Intervenor.*

ON APPEAL FROM THE SUPREME COURT OF INDIANA

BRIEF OF APPELLANTS

REFERENCE TO THE OPINION BELOW

The Supreme Court of Indiana combined the present case with the aforementioned case of *Short* v. *Texaco, et al.,* for purposes of its opinion. This opinion is reported as *Short* v. *Texaco,* (1980), ____ Ind. ____, 406 N. E. 2d 625. It is reprinted in the Joint Appendix, pages 37 to 49.

The unreported "Memorandum Opinion and Judgment on Agreed Case" entered by Judge Walter Palmer, Judge of the Gibson County Circuit Court, dated July 24, 1978, is reprinted in the Joint Appendix, pages 33 to 36.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Indiana, declaring constitutional the Indiana Statute, Indiana Code 32-5-

11-1 through 32-5-11-8, commonly known at the Indiana Mineral Lapse Act, was entered on June 23, 1980.

A petition for rehearing, timely filed, was denied by the Supreme Court of Indiana on September 24, 1980.

A Notice of Appeal to this court was duly filed in the Supreme Court of Indiana on December 5, 1980.

This Appeal was docketed in this court on December 19, 1980, which was within ninety (90) days from the denial of rehearing below. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257, Subparagraph 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

14th Amendment, Section 1, United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 10, United States Constitution:

"No state shall enter into any treaty, alliance or a confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin as tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts, or grant any title of nobility."

The Indiana Code 32-5-11-1 through 32-5-11-8: (Printed in Appendix "A")

STATEMENT OF THE CASE

The action at bar was filed in the Circuit Court of Gibson County, Indiana, as an Agreed Case, with an Agreed Statement of Facts, pursuant to an Indiana Statute, Indiana Code 1971, Section 34-1-29-1 and following. The parties stipulated that the sole issue for determination by the trial court was whether the Indiana Mineral Lapse Act, Indiana Code 1971, Sections 32-5-11-1 through 32-5-11-8, was constitutional under the Constitution of the United States and the Constitution of the State of Indiana. All of the questions set forth in the section of the Jurisdictional Statement entitled "The Questions Presented for Review" were first raised and presented to the trial court. The Agreed Statement of Facts, as found on pages 4 to 29 of the Joint Appendix, may be summarized as follows:

On March 1, 1954, Clara M. Haper, Eden H. Pond and Edna H. Bobe were the owners as tenants in common of an eighty acre tract of land in Gibson County, Indiana. On that date, they conveyed by Warranty Deed this eighty acre tract to Ulysses Walden and Mildred Walden, his wife. This Warranty Deed contained a reservation of the total mineral estate by the grantors, Clara M. Haper, Eden H. Pond and Edna H. Bobe.

On August 13, 1959, Ulysses G. Walden and Mildred Walden conveyed by Warranty Deed to Ulysses G. Walden, Jr. and Carolyn Sallee Walden, his wife, a seventy-nine acre tract of land which was part of the aforementioned eighty acre tract.

About the year 1958, Clara M. Haper died intestate leaving as her sole and only heirs her daughters, Eden H. Pond

and Edna H. Bobe, who succeeded to the interest of Clara M. Haper in the severed minerals under the eighty acre tract.

On June 17, 1976, Eden H. Pond, Edna H. Bobe and Raymond W. Bobe, her husband, as lessors, made, executed and delivered to Consolidation Coal Company, as lessee, a coal mining lease covering forty acres of the aforementioned seventy-nine acre tract. On March 4, 1977, Ulysses Grant Walden, Jr., and Carolyn Sallee Walden gave written notice to Edna H. Bobe and Eden H. Pond of the lapse of the mineral interest pursuant to the Indiana Mineral Lapse Act. On the same date, March 4, 1977, there was published in the Princeton Daily Clarion, a daily newspaper in Gibson County, Indiana, a notice of the lapse of the mineral interest pursuant to the Indiana Mineral Lapse Act. On May 27, 1977, Charles R. Nixon, as Attorney for Ulysses Grant Walden, Jr., sent a notice to Consolidation Coal Company of the claim of his client, Ulysses Grant Walden, Jr.

On January 12, 1978, the Agreed Statement of Facts [Complaint] was filed in the Circuit Court of Gibson County, Indiana. It was stipulated by Eden H. Pond and Edna H. Bobe that they had made no use of the mineral interest as defined by the Mineral Lapse Act, and had not filed a Statement of Claim with the Recorder of Gibson County, Indiana, setting forth their ownership of the mineral interest. It was further stipulated by the parties that the sole question for determination by the trial court was whether the Indiana Mineral Lapse Act is constitutional under the Constitution of the United States and the Constitution of the State of Indiana. If the statute is unconstitutional, Eden H. Pond and Edna H. Bobe are the owners of the mineral interest in and under the subject property.

If the Mineral Lapse Act is constitutional, the owners of the mineral interest pursuant to the statute are Ulysses G. Walden, Jr. and Carolyn Sallee Walden, his wife.

Pursuant to an Indiana statute, the Attorney General of the State of Indiana was notified during the lawsuit that the constitutionality of a state statute was being questioned. The Attorney General entered his appearance in the action and submitted trial briefs on the question of the constitutionality of the act. In addition, Louise F. Short filed a Petition to Intervene in the action and such petition was granted by the court. After the questions regarding the constitutionality of the Indiana Mineral Lapse Act were fully briefed and oral argument was heard, the Trial Court rendered its "Memorandum Opinion and Judgment on the Agreed Case" on July 24, 1978, holding that the Indiana Mineral Lapse Act was unconstitutional. (Joint Appendix, pages 33 to 36).

Several weeks after the trial court's opinion and judgment in the present case, the trial court issued its judgment in another case that was pending in the Gibson Circuit Court involving the constitutionality of the Indiana Mineral Lapse Act, which case was styled *Louise F. Short* v. *Texaco, Inc., et al.,* and which has been consolidated with the present case by this Court. The *Short* case involved oil and gas mineral interests only. The trial court held that the Indiana Mineral Lapse Act was also unconstitutional as it applied to oil and gas mineral interests.

Constitutional questions being involved, pursuant to the Indiana Rules of Appellate Procedure, a direct appeal was taken from the trial court judgment to the Supreme Court of Indiana. Again, all the questions presented in this appeal were raised, briefed and argued before the Supreme Court of Indiana. The Attorney General of the State of

Indiana was a party to the appeal and represented the State of Indiana on the question of the constitutionality of the Act. *Short* v. *Texaco* was also appealed directly to the Supreme Court of Indiana. The Supreme Court of Indiana combined the present case with *Short* v. *Texaco* for purposes of oral argument and opinion.

On June 23, 1980, the Supreme Court of Indiana issued a joint opinion in the two cases — the present case and *Short* v. *Texaco* — reversing the Trial Court and declaring that the Indiana Mineral Lapse Act was constitutional. (Joint Appendix, pages 37 to 49). Petition for Rehearing was timely filed with the Supreme Court of Indiana, which petition was denied on September 24, 1980.

SUMMARY OF THE ARGUMENT

The Indiana Mineral Lapse Act is unconstituional and void for the following reasons:

1. The Indiana Mineral Lapse Act violates the Fourteenth Amendment of the United States Constitution by taking a very valuable property interest without providing due process protections to the owner of the severed mineral interest. Without question, a mineral interest is a property right protected by the due process clause of the Fourteenth Amendment. By providing for the transfer of the severed mineral interest from the record owner to another entity (usually the surface owner), a taking of property by the state is effected. Yet the Indiana Mineral Lapse Act makes no provision for notifying the owner of the severed mineral interest that his valuable property right is being taken. There is not even a requirement that the owner of the severed mineral interest be notified after the severed mineral interest has been taken. No provision is made in the

Mineral Lapse Act for a hearing in which the owner of the severed mineral interest might contest the taking of his mineral interest. This is not a situation in which the Court need determine whether a pretermination hearing is necessary or whether a prompt post-termination hearing is adequate, because the Mineral Lapse Act has no provision for a hearing at any time. Finally, the Mineral Lapse Act makes no provision for compensating the owner of the severed mineral interest for the taking of his valuable property rights which is clearly required under the Fifth and Fourteenth Amendment due process clauses.

The Indiana Mineral Lapse Act is not analogous to statutes of limitations, marketable title acts or recording legislation. Statutes of limitations, recording acts and marketable title acts are remedial, protecting the owner of record of an estate in land against stale, spurious or doubtful claims arising prior to the commencement of the statutory period or against unknown or hidden claims. Statutes of limitations and marketable title acts are in aid of the record title owner, whether of the surface or mineral estate or the entire fee. Dormant mineral legislation is in derogation of the rights of the record owner. Dormant mineral legislation is intended and in fact does take substantive property rights, being the total ownership of the mineral estate. Statute of limitations and marketable title acts merely limit the procedural remedies available to one challenging record ownership. Furthermore, remedial acts are meant to aid the record title owner and assist in removing clouds upon that title whereas dormant mineral legislation is meant to take the valid unchallenged ownership of a real property interest from a rightful owner.

2. The Indiana Mineral Lapse act also places a severe impairment on contractural rights without using the means

and methods appropriate to the nature and purpose of the legislation. In the present case, the reservation of the mineral estate in the Warranty Deed of March 1, 1954, constituted a contract between the parties to the conveyance and created on-going rights and duties with respect to the reservation of the mineral estate. The Indiana Mineral Lapse Act severely, in an unanticipated and retroactive fashion, changes the obligations of the parties to the contract by requiring certain uses of the property be made or a statement of claim filed, which if not done, leads to complete destruction of the contract. There has been no showing of any emergency need to justify this severe impairment of contractural rights. Furthermore, the legislation was not appropriately tailored to the purpose for which it was designed to met.

3. The Indiana Mineral Lapse Act violates the equal protection clause of the Fourteenth Amendment by creating a classification which makes it mandatory that notice be given to a small special interest group, before the lapse of the mineral interest occurred, while not requiring that notice be given to all other severed mineral interest owners affected by the Act, who are in similar need of such protection. The Mineral Lapse Act creates a classification which provides due process notice to a small special interest group, while depriving all other owners of severed mineral interest this basic constitutional right. Even if this Court would view this classification as being of a social or economic nature, thus utilizing a low level scrutiny test, the classification must be considered arbitrary and capricious.

ARGUMENT

I. INTRODUCTION

Under Indiana law, as in all common law jurisdictions,[1] it is possible to separate or sever the mineral ownership in real estate from the ownership of the surface. With the passage of time, it is possible for the severed mineral estates to become fractionalized, making it potentially difficult to identify and locate the owners. This can impede the development of the mineral estate.[2] In response to this perceived problem, a number of state legislatures have enacted what are commonly called dormant mineral statutes. These statutes are of two general types: (1) recordation statutes which require specified severed mineral owners to register their interests, with the failure to register resulting in the merger of the mineral estate with the surface or forfeiture to the state; and (2) statutes imposing specific requirements — such as specified uses of the minerals, actual production, taxation or registration — which if not satisfied within a set period of time, will cause the severed mineral estate to merge with the surface estate.

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[1]See Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles*, 7 Land and Water L. Rev. 73, 73-74 (1972).

[2]For commentaries on this problem *see*, Hardy, *Ancient Mineral Claims — An Obstacle to Development*, 28 Ann. Inst. on Oil & Gas L & Tax 137 (1977); Kurtz, *Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest*, 22 Ann. Inst. on Oil & Gas L. & Tax 81 (1971); Outerbridge, *Missing and Unknown Mineral Owners*, 25 Rocky Mtn. Min. L. Inst. 20-1, 20-57 (1979).

The states of Minnesota,[3] Wisconsin[4] and South Dakota[5] have enacted the first type of dormant mineral legislation. Illinois,[6] Indiana,[7] Michigan[8] and Nebraska[9] have enacted the second type of dormant mineral legislation.

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[3]Minn. Stat. Ann. §§ 93.52 to 93.58 (West 1977, Supp. 1979). This statute required the owner of the severed mineral interest to file a verified statement of ownership with the register of deeds, and pay a yearly tax. Failure to substantially conform to the statute caused the severed mineral interest to forfeit to the state. Act amended in 1979, *Minn. State. Ann.* § 93.55(1) to require notice and a hearing prior to forfeiture.

[4]Wis. Stat. Ann. § 700.30 (West Supp. 1979). Under the Wisconsin statute the owners of severed mineral rights were required to record the severance instrument with the register of deeds of the county within three years from the date of the act or the date of the instrument, whichever was later. Failure to record within this time period caused the mineral interests to revert to the surface fee owner. In addition, the statute required payment of an initial, and thereafter an annual, registration fee to preserve the mineral rights. Failure to pay such registration fees within three years from the due date also resulted in the reversion of the mineral interests to the surface fee owner.

[5]S.D. Codified Laws Ann. § 43-30-8.1 (Supp. 1979). This statute requires that one claiming a severed mineral interest record an instrument describing that interest with the register of deeds at least once every ten years, or it will merge with the surface estate.

[6]Ill. Ann. Stat. ch. 30, §§ 197, 198 (Smith-Hurd Supp. 1980). The Illinois statute required production of the severed oil and gas mineral interests or written notice recorded with the county recorder's office within 25 years after its creation, or the mineral interest would be deemed abandoned. Ownership would then vest in the surface owner. There was a three year grace period after the effective date of the Act to produce oil and gas or file the written notice.

[7]Ind. Code Ann. §§ 32-5-11-1 to 32-5-11-5 (Burns 1973).

(Footnotes continued on next page)

Six of the above dormant mineral acts have been constitutionally challenged in each state's highest court. The Illinois,[10] Minnesota,[11] Nebraska[12] and Wisconsin[13] statutes were found to be unconstitutional in some way, while the Indiana[14] — in the present case — and Michigan[15] statutes were upheld.

(Footnotes continued from preceding page)

[8]Mich. Comp. Laws Ann. §§ 554.291 to 554.294 (1967). The Michigan statute requires the owner of an oil and gas mineral interest to make certain statutorily defined uses of the property or record a notice of interest with the register of deeds, within 20 years of the creation of the severed interest, or else the mineral interest is deemed abandoned, with a reversion to the surface owner. There is a three year grace period immediately following the effective date of the Act given to the mineral interest owners allowing them to record notices preserving their interests.

[9]Neb. Rev. Stat. §§ 57-228 to 57-231 (1978). The Nebraska statute applied to all severed mineral interests and provided that the owners of the surface could bring an action seeking a termination and extinguishment of the severed mineral inteersts, naming as party defendants all persons having or appearing to have an interest in the severed mineral interests. The severed mineral interests would be deemed abandoned if for a period of 23 years prior to the filing of the lawsuit, certain statutorily defined uses of the property had not been made or a verified claim of interest recorded. There was also a two year grace period after the effective date of the statute in which the severed mineral interest owner could assert his claim.

[10]*Wilson* v. *Bishop*, (1980) ____ Ill. 2d ____, 412 N. E. 2d 522.

[11]*Contos* v. *Herbst*, (Minn. 1979) 278 N. W. 2d 732, 740, appeal dismissed sub. nom. *Prest* v. *Herbst*, 444 U. S. 804.

[12]*Wheelock* v. *Heath*, (1978) 201 Neb. 835, 272 N. W. 2d 768.

[13]*Chicago & N.W. Transp. Co.* v. *Pedersen*, (1977) 80 Wis. 2d 566, 259 N. W. 2d 316.

[14]*Short* v. *Texaco*, (1980) ____ Ind. ____, 406 N. E. 2d 625.

[15]*Van Slouten* v. *Larsen*, (1980) ____ Mich. ____, 299 N. W. 2d 704.

II. LEGISLATIVE HISTORY OF INDIANA ACT

The Indiana Dormant Mineral Act, or Mineral Lapse Act, Indiana Code Section 32-5-11-1 through 32-5-11-8, was enacted by the Indiana Legislature in 1971. (Pub. L. No. 423 [1971] Ind. Laws 1970). The principal draftsman of the Act was Ronald W. Polston, a professor of law at Indiana University-Indianapolis Law School.[16] While there is little legislative history regarding the Act, Professor Polston did author a law journal article in 1972 in which he proposed the Indiana Act, with modifications, as a model for dormant mineral legislation.[17] Professor Polston discussed the legislative background to the passage of the Indiana Act in this article.[18]

Professor Polston argued that severed mineral interests whose present owners cannot be ascertained create a title problem which hinder mineral development.[19] The Indiana Mineral Lapse Act was proposed and drafted with the intent of changing the common law in Indiana as it applied to severed mineral interests in an attempt to place the severed mineral interests back into the stream of commerce.[20]

For purposes of this argument, a challenge is not made to this asserted public purpose behind the Act, although a strong difference of opinion exists as to the need for such legislation. *See* Outerbridge, *Missing and Unknown Mineral Owners,* (1979) 25 Rocky Mtn. Min. L. Inst., 20-1,

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[16]Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles,* 7 Land and Water L. Rev. 73 (1972), *see* footnote 59, page 90.

[17]*Id.*

[18]*Id.*

[19]*Id.* at 74.

[20]*Id.* at 74.

20-57. However, this case does challenge the means and methods used to accomplish this purpose as not complying with the constitutional dictates of due process, the contract clause and equal protection.

III. RELEVANT PRINCIPLES OF INDIANA MINERAL LAW

As previously stated, it has long been held at common law in Indiana, as in all common law jurisdictions, that a separate legal mineral estate or a separate interest in minerals may be created independent of the ownership of the land itself. *Heller* v. *Dailey*, (1902) 28 Ind. App. 555, 63 N. E. 490. This principle as it applied to oil and gas interests in land was also codified by the Indiana legislature in Indiana Code 32-5-7-3.[21] The severance of the minerals from the surface creates two estates,[22] of equal dignity, each a freehold estate of inheritance that may be

[21]Indiana Code 32-5-7-3. Nature of Estates. — Interests in the oil and gas in or on or under or that may be taken from beneath the surface of lands lying within the state may be created for life, for a term of years, or in fee, in such manner and to such extent as are all other interests in real estate; and title to such estate may be vested in one or more persons, by sole ownership, tenancy in common, joint tenancy, tenancy by the entireties, or in such other manner as may be now or hereinafter recognized in the law of this state. Such interests or estate shall be freely alienable, in whole or in part, and in like manner as are other interests in real estate.

[22]Indiana Code 32-5-7-3. Also, the Supreme Court of Indiana in its opinion, Joint Appendix pages 38 to 39, stated:

> "Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership."

conveyed separately thereafter.[23] The severed mineral estates are considered to be interests in real property.[24]

Not only is it true that separate legal mineral estates may be created in all the minerals on, in or under particular parcels of land, Indiana has further held that coal and other solid minerals are corporeal hereditaments. *Heller* v. *Dailey, supra,* 63 N. E. at 492-493; *Monon Coal Company* v. *Riggs,* (1944) 115 Ind. App. 236, 56 N. E. 2d 672, 57 N. E. 2d 598; *Halbert* v. *Hendricks,* (1950) 121 Ind. App. 43, 95 N. E. 2d 221; *Board of Commissioners of County of Sullivan* v. *Heap,* (1973) 115 Ind. App. 633, 294 N. E. 2d 182. At common law, corporeal hereditaments cannot be abandoned.[25] Even if this was a property interest which could be abandoned, e.g. an incorporeal hereditament, there must be a concurrence of the intention to abandon the property and actual relinquishment of the property before an abandonment would occur. *Schaffner* v. *Benson,* (1929) 90 Ind. App. 420, 166 N. E. 881; *Hoeppner* v. *Slagle,* (1967) 141 Ind. App. 622, 231 N. E. 2d 51. It has further been held under Indiana law that mere nonusage does not show an intention to abandon. *Simpkin* v. *New York Central Railroad Company,* (1966) 138 Ind. App. 668, 214 N. E. 2d 661.

In addition, it has been held that a severed mineral estate cannot be obtained by adverse possession of the surface alone, and that mere nonusage of the minerals does not terminate the severed mineral estate. *McBeth* v. *Wetnight,* (1914) 57 Ind. App. 47, 106 N. E. 407, 410.

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[23]Indiana Code 32-5-7-3.

[24]*Id.*; see also *Heller* v. *Dailey, supra.*

[25]Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles,* 7 Land and Water L. Rev. 73 (1972).

Therefore, prior to the effective date of the Indiana Mineral Lapse Act, being September 2, 1972, the severed mineral interest would not have been lost by the owners of the severed minerals, Eden H. Pond and Edna H. Bobe, on the theory of adverse possession or abandonment. Furthermore, at the time the mineral interest was reserved, being March 1, 1954, (Joint Appendix, pages 10 and 11) there was no common law or statutory requirement that use be made of the mineral interest in order to preserve the interest.

While the Indiana Mineral Lapse Act does not use language of abandonment as is the case in some dormant mineral acts of other jurisdictions,[26] it creates in effect a new criterion for abandonment, with retroactive application, requiring the owner of the vested mineral interest to make use of the mineral interest or file a statement of claim in order to avoid the presumption that the severed mineral interest was abandoned. Therefore, in the present case, the owners of the severed mineral interest, Eden H. Pond and Edna H. Bobe, who had no contractural, statutory, or common law obligation to use their mineral interest when that interest was created, find themselves in peril of losing this valuable, vested mineral interest in real property, by a statute which retroactively places an obligation on them to make a statutorily defined use of the property or file a statement of claim, without any notice or hearing being provided them to challenge the legitimacy of the lapse.

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[26]Ill. Ann. Stat., ch. 30, § 197 (Smith-Hurd Supp. 1980); Mich. Comp. Laws Ann., § 554.291 (1967); Neb. Rev. Stat. § 57-229 (1978).

IV. THE INDIANA MINERAL LAPSE ACT UNCONSTITUTIONALLY TAKES PROPERTY WITHOUT DUE PROCESS PROCEDURES BEING SATISFIED

Under the Indiana Mineral Lapse Act, persons who acquired mineral interests long before its passage, as did appellants herein, were automatically deprived of those interests if they had not performed certain specified acts during the 20 year period prior to the statute's passage and if they thereafter failed to register their interest in the property in the ensuing two years. Thus, the Indiana statute applies retroactively to property interests created prior to its passage. The difficulty or ease of performing those acts is of no significance here, because the statute provides no notice to mineral interest holders as to what is expected of them. It similarly provides no opportunity for them to appear in any forum, administrative or judicial, to declare their interest in their property or to show that they would have met the statute's requirements had they known of them. It does not even give them an opportunity to show that they did in fact meet the requirements of the Act.

As they did in the court below and as they reiterated in their opposition to appellants' jurisdictional statement, appellees will doubtless argue in this Court that the Indiana Mineral Lapse Act, as well as other similar statutes recently passed by other states, are necessary measures in an age of energy scarcity. Appellees will contend, as they have before, that the existence of severed mineral interests impairs the development of oil, gas, coal, and other resources, which could be more expeditiously extracted if clear title to such resources were conveyed to surface owners.

Again, we do not challenge these arguments, because we recognize that this Court is not the proper place to debate

the wisdom of a state statute. See e.g., *North Dakota State Board of Pharmacy* v. *Snyder's Drug Store, Inc.*, (1973) 414 U. S. 156, 164-167, 94 S. Ct. 407, 38 L. Ed. 2d 379. Our quarrel here is with the procedural aspects of the statute—i.e., the absence of any notice or hearing associated with its operation. At a time when this Court has required the States to provide notice and an opportunity to be heard even with respect to such matters as the temporary interruption of service provided by a public utility, *Memphis Light, Gas & Water Division* v. *Craft*, (1978) 436 U. S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30, it seems inconceivable that a state can deprive a person of a fee interest in real estate—the very core of the property rights protected by the due process clause—and yet fail to afford any notice or opportunity to be heard. See also *Matthews* v. *Eldridge*, (1976) 424 U. S. 319, 325 n.4, 96 S. Ct. 893, 47 L. Ed. 2d 18; *Goldberg* v. *Kelly*, (1970) 397 U. S. 254, 90 S. Ct. 1101, 25 L. Ed. 2d 287. Indeed, as we show in the following section, the Indiana statute's impact upon a mineral interest is so pervasive as to constitute a taking, which a state can achieve only if it observes the procedures required by the Fifth and Fourteenth Amendments.

A. The Act Takes Property Without Providing an Adequate Opportunity to Protect the Property Interest and Without Providing for Compensation.

The taking clause of the Fifth Amendment has long been recognized by this court as a limitation upon the power of the States:

> The pertinent words of the Fifth Amendment of the Constitution of the United States are the familiar "nor shall private property be taken for public use, without just compensation." That prohibition, of course,

applies against the States through the Fourteenth Amendment.

Webb's Fabulous Pharmacies, Inc. v. *Beckwith,* (1980) ____ U. S. ____, 101 S. Ct. 446, 450, 66 L. Ed. 2d 358. See *Chicago, B. & Q. R. Co.* v. *Chicago,* (1897) 166 U. S. 226, 239, 241, 17 S. Ct. 581, 41 L. Ed. 979.

The Indiana Mineral Lapse Act unquestionably affects a taking of private property. It takes the title to the property of one person and gives it to another because the State believes this transfer of ownership will more nearly conform with the State's policies.

There is no issue here of a "regulatory taking" where courts are asked to perform the often difficult task of establishing the line between regulation of the use of property and taking. See, e.g., *San Diego Gas & Electric Co.* v. *San Diego,* No. 79-678, slip op. at 14, n.15, (Brennan, Stewart, Marshall & Powell, JJ., dissenting). Here, the statute takes, in the words of *Andrus* v. *Allard,* (1979) 444 U. S. 51, 66, 100 S. Ct. 318, 62 L. Ed. 2d 210, the "full 'bundle' of property rights" possessed by a mineral estate owner, not merely "one 'strand' of the bundle." In prohibiting the subsurface owner's "right to exclude" the surface owner from access to any oil, gas, coal, or other minerals underlying the real estate, it takes what is "universally held to be a fundamental element of the property right [that] falls within this category of interests that the Government cannot take without compensation." *Kaiser Aetna* v. *United States,* (1979) 444 U. S. 164, 179-10, 100 S. Ct. 383, 62 L. Ed. 2d 332 (footnote omitted).[27]

[27] Indeed, the Indiana statute goes beyond the taking condemned in *Kaiser Aetna,* since it gives the surface owner the right to exclude the mineral estate holder from the use of his own property.

Because the taking here is so clear-cut, relatively few modern cases are on point, there being only a limited number of cases that involve the taking of every vestige of ownership. But see *Armstrong* v. *United States*, (1960) 364 U. S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554. However, a number of cases that involve lesser invasions of property rights caused by the regulation of property demonstate *a fortiori* the unconstitutionality of the Mineral Lapse Act.

Pennsylvania Coal Co. v. *Mahon*, (1922) 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 332, recently described by this Court as the "leading case" in this area,[28] is instructive. *Mahon* also dealt with severed mineral interests and the conflicting claims of surface owners. There, a Pennsylvania statute prohibited the mining of coal by a mineral estate owner, if such activities threatened to cause subsidence that might endanger the surface owner. Although recognizing that the State could be concerned with public safety under such circumstances, the Court struck down the Pennsylvania statute, because "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. Here, of course, the coal, oil or gas of the mineral estate owner has been appropriated and given to the surface owner.

Although rejecting taking claims advanced by the property owner, *Penn Central Transportation Co.* v. *City of New York*, (1978) 438 U. S. 104, 98 S. Ct. 2646, 57 L. Ed. 631, also supports the position of appellants here. In that case, the Court idenified "several factors that have

[28] *Penn. Central Trans. Co.* v. *New York City*, (1978) 438 U. S. 104, 127, *reh. denied*, 439 U. S. 883. See also *San Diego Gas & Electric Co.* v. *San Diego*, No. 79-678 (March 24, 1981), slip. op. at 13-14 (Brennan, Stewart, Marshall & Powell, JJ., dissenting).

particular significance" in determining whether Government activity constitutes a taking. *Id.* 438 U. S. at 124. As the first such factor, the Court referred to "the economic impact of the regulation on the claimant, and, particularly, the extent to which the regulation has interferred with distinct investment-backed expectations. . . ." *Id.* In the instant case, the Indiana statute destroys a property interest that is created solely for the pursuit of "investment-backed expectations."

The second factor referred to by the Court in *Penn Central* was drawn from

> . . . Decisions in which this Court has dismissed taking challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the Claimant to constitute property for Fifth Amendment purposes. *Id.* at 124-25.

Once again, this factor highlights the nature of the taking in this case. The lower court did not dispute that the mineral interest destroyed by the Indiana statute constitutes "property" as that term is used in both the Fifth and Fourteenth Amendments. To the contrary, the Indiana Supreme Court declared that the mineral interests affected by the challenged legislation are

> . . . interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are

> themselves of great utility and benefit to the society as a means of facilitating the development of natural resources. (Joint Appendix, page 39)

As an illustration of the final factor, the Court in *Penn Central* referred to "instances in which a state court reasonably concluded that health, safety, morals or our general welfare would be promoted by prohibiting particular contemplated uses of land," citing "zoning laws" as the "classic example" of the type of state regulation that usually pass constitutional muster. *Id.* 438 U. S. at 125. The Indiana statute cannot be so justified. Rather than prohibiting "particular contemplated uses of land," it completely destroys all of the mineral estate holder's interests. Moreover, it conveys these interests to the surface owner so that he or she may engage in precisely the same activity as the mineral estate owner—extraction of oil, gas, coal, or other minerals.

The principles of *Mahon* and *Penn Central* have been recently embraced by four or perhaps five members of this Court in *San Diego Gas & Electric Co.* v. *City of San Diego, supra,* No. 79-678 (March 24, 1981). In the dissenting opinion authored by Justice Brennan, joined by Justices Stewart, Marshall, and Powell, and described by Justice Rehnquist as stating principles with which he "would have little difficulty in agreeing" had he accepted the dissenting view that the opinion below was a final judgment ripe for Supreme Court review, these members of the Court agreed that a " 'taking' may also occur without a formal condemnation proceeding or transfer of fee simple." Slip op. at 15-16 (Brennan, Stewart, Marshall & Powell, JJ., dissenting). The dissent continues:

> In service of this principal, the Court frequently has found "takings" outside the context of similar con-

> demnation proceedings or transfer of fee simple, in cases where Government action benefiting the public resulted in destruction of the use and enjoyment of private property. *Id.* at 16.

On this basis, these Justices determined that a zoning ordinance of the City of San Diego that restricted the property owner's rights to construct a nuclear power plant on its property constituted a taking for which the government owed the utility just compensation.[29]

The principles fairly extracted from *Mahon*, *Penn Central*, and *San Diego Gas & Electric*, as well as other cases that condemn regulation that rises to the level of a taking, apply *a fortiori* here. In such cases nominal title is left in the property owner, but the owner is prevented from productively using its property. Here, in order to effect what Indiana considers to be a valid public policy, title is actually removed from the mineral estate owner and is transferred to the surface owner.

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[29]This recognition by the dissenters in *San Diego Gas & Electric* that a taking can occur through the exercise of a Government's regulatory authority, rather than through the explicit invocation of eminent domain powers, highlights a further error of the Indiana court. In reversing the trial court's judgment that the Indiana statute constitutes a taking of property without just compensation, the court stressed that "the state through this statute is not actually taking the mineral interest for its own use and benefit." 406 N. E. 2d at 631. The Court went on to observe that "the Mineral Lapse Act does not involve the injury to private property through conduct or activity of Government agents or others having or exercising the power of eminent domain." *Id.* The dissenters in *San Diego Gas & Electric* clearly rejected this view of the law of just compensation and eminent domain. While the Indiana Supreme Court's error in this regard was limited to its discussion of the Indiana Constitution, there can be no question but that it also permeated its view of the federal taking issues raised below.

That the direct beneficiaries of the Indiana statute are private parties, rather than the state itself, does not make it any less a taking. The same was true in *Mahon*. Moreover, the Court's recent opinion in *Northern Cheyenne Tribe* v. *Hollowbreast*, (1976) 425 U. S. 649, 96 S. Ct. 1793, 48 L. Ed. 2d 274, was premised upon the assumption that the transfer of title to severed mineral interests from one group of private parties to an Indian tribe pursuant to federal legislation would constitute a taking by the United States, if the person from whom these rights were taken had a vested interest in them. See *Id.* at 651-52. And in *Regional Rail Reorganization Act Cases*, (1974) 419 U. S. 102, 148-155, 95 S. Ct. 335, 42 L. Ed. 2d 320, this Court recognized that the statutorily directed transfer of railroad properties to Conrail—"basically a private, not a governmental, enterprise," *Id.* at 152—could "indeed be a taking of private property for public use." *Id.* at 155. See also *Berman* v. *Parker*, (1954) 348 U. S. 26, 33-34, 75 S. Ct. 98, 99 L. Ed. 27.

Finally, it is clear that the Indiana Mineral Lapse Act could not be justified as constituting a taking of property for private use only, since this type of taking is strictly prohibited by the due process clause. *Missouri Pacific R. Co.* v. *Nebraska ex rel. Board of Transportation*, (1896) 164 U. S. 403, 417, 17 S. Ct. 130, 41 L. Ed. 489, 495. The due process clause requires a public purpose in the state legislation before there can be a taking permissible under the due process clause. However, as discussed above, it clearly appears from prior decisions of this Court that the taking of private property caused by the Indiana Mineral Lapse Act would be considered a public use requiring just compensation, as well as other due process protections of notice and hearing.

B. Alternative Constitutionally Approved Methods Exist to Achieve the Goals of the Act.

It is clear that the Indiana Mineral Lapse Act attempts to satisfy public policy needs in an unconstitutional fashion —by taking property without providing notice, or an apportunity for the severed mineral interest owner to be heard regarding the lapse, or providing just compensation for the taking. The case law which this Court has developed in reviewing state escheat statutes reveals a constitutional path to achieve the policies underlying the Mineral Lapse Act and other similar legislation.

This Court has reviewed a number of cases involving state escheat statutes. See *Standard Oil Co.* v. *New Jersey*, (1951) 341 U. S. 428, 71 S. Ct. 822, 95 L. Ed. 2d 1078; *Anderson National Bank* v. *Luckett*, (1944) 321 U. S. 233, 88 L. Ed. 692; *Security Savings Bank* v. *State of California*, (1923) 263 U. S. 282, 44 S. Ct. 108, 68 L. Ed. 301. In these cases, various statutes provided that certain "dormant" property—inactive bank accounts, unclaimed dividends, or the like—would escheat to the state after the passage of a fixed number of years of "dormancy." In each case, however, this Court has made it clear that escheat statutes must provide notice and an opportunity for the absent owner to appear and declare his or her interest in the property at issue. Thus, in *Anderson National Bank, supra,* the Court stated, "[O]ur inquiry must be directed to the question whether the procedure by which the state undertakes to acquire the depositors' right to demand payment of the deposits was upon adequate notice to them and opportunity for them to be heard." 321 U. S. at 243. *See also Security Savings Bank* v. *State of California, supra,* 263 U. S. at 287.

The notice and hearing requirement associated with escheat both protects the interests of private parties and

promotes the States' interest in unfettering forgotten or abandoned property simply and inexpensively. If the owner of a dormant bank deposit, for instance, responds to the notice by appearing at the hearing to claim his interest, title to the account is not transferred. If, however, after provision of the best possible notice under the circumstances, *see Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), no one appears to assert his or her ownership or other claim to the funds, the State can validly conclude that the property has been abandoned and can therefore order the transfer of the account without the payment of compensation to the absent or defaulting party. The transfer of the absent or defaulting parties' property to the state under these circumstances does not represent an unconstitutional taking of property without just compensation any more than a default judgment entered in an ordinary civil action involving title to real estate.

The objective sought to be promoted by the Mineral Lapse Act could similarly be achieved in a simple administrative or judicial proceeding, at the option of the State, notice of which is provided by, as in *Mullane*, personal notice to reasonably identifiable individuals and by publication to all others. If the owner of the mineral interest appears and asserts a claim to the interest, the proceeding could be terminated. If no one appears in response to the notice, the interest could be transferred to an identifiable owner on the ground that it has been abandoned. At the same time, the default by the record owner of the mineral interest means that no one will have appeared to whom compensation must be paid. So not only would the objective of the Act be achieved, but the constitutional flaw identified in the prior section would be rectified.

C. The Act Does Not Provide for Notice and Hearing to Contest the Legitimacy of the Taking.

Even if this Court held that due process did not require giving the severed mineral interest owner prior notice and an opportunity to come forward and preserve his interest, or be compensated for the loss of that interest, the Indiana Mineral Lapse Act would still violate due process by its failure to provide for notice and a hearing to the owner of the severed mineral interest regarding the legitimacy of the taking of the mineral interest. It was primarily because of this failure to provide notice and a hearing to the owners of the mineral interests that the trial court found the Act unconstitutional (Joint Appendix, page 35).

The Indiana Mineral Lapse Act makes no mandatory provision for giving notice, or providing a hearing, at any time, either before or after the taking of the severed mineral interest. Rather, the Act provides for a preemptory, automatic, self-executing and irremediable taking. Indiana Code 32-5-11-1 (Appendix A, page A-1), states:

> Any interest in coal, oil and gas, and other minerals, *shall*, if unused for a period of twenty years be extinguished, unless a statement of claim is filed in accordance with section 5 hereof, and the ownership *shall* revert to the then owner of the interest out of which it was carved. (Emphasis added.)

Indiana Code 32-5-11-6 (Appendix A, page A-4), states:

> Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, *may* give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is

> located and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten days after such publication a copy of such notice to the owner of such mineral interest. . . . (Emphasis added.)

As can be seen, there is no requirement whatsoever that notice be given to the owner of the mineral interest prior to the lapse of the mineral interest. After the lapse of the mineral interest, the successor in interest *may* give notice to the mineral interest owner of the fact that the mineral interest has already lapsed. However, even if such notice is given after the lapse of the mineral interest, there is nothing which the mineral interest owner can do to preserve the interest. Therefore, the taking of the mineral interest becomes final before any notice provision of the Indiana Mineral Lapse Act applies, and then the successor in interest has the option of giving notice of the lapse or remaining silent.

The Supreme Court of Indiana, in reversing the trial court's decision that the Act violated procedural due process protection, held that no hearing was necessary in that the Act merely set forth the conditions which, when existing, mandated the extinguishment of the mineral interest. If there was a dispute as to whether those conditions did in fact exist, then a court could be called upon to determine these facts. (Joint Appendix, page 41). The view expressed by the Supreme Court of Indiana indicates a fundamental misconception as to how the Act, in fact, operates. Typically what occurs is that the successor in interest—who is usually the surface owner—is aware of the date the mineral severance was created. If more than twenty years have passed since the severance, the successor in interest will examine the County Recorder's records or

have an abstract of title updated, in order to ascertain whether any use of the minerals appears of record or whether a statement of claim, pursuant to Indiana Code 32-5-11-4, has been filed. If no document appears of record which indicates that use was made of the mineral interest within the last twenty years or if no statement of claim was filed, then the successor in interest must make a determination as to whether use has been made of the mineral interest as provided for in the Act, Indiana Code 32-5-11-1, which might not appear of record. Such unrecorded uses might include an unrecorded lease, a lease over 20 years old but kept valid by production, or production of coal by the owner of the severed mineral interest from a common vein or seam. After making these factual determinations, the successor in interest then asserts ownership of the mineral interest based upon the severed mineral interest owner's failure to use the mineral interest or file a statement of claim. Since the successor in interest does not have to give notice of the extinguishment to the severed mineral interest owner, he can immediately begin to use the mineral interest by leasing or producing the minerals, without the severed mineral interest owner ever being made aware that someone is asserting ownership to the mineral interest. In fact, some types of mineral production, e.g. underground coal mining, may not even be apparent to the owner of the severed mineral interest upon inspection of the property.

Therefore, what the Act in fact does, is make the successor in interest—the individual who will directly benefit by the lapse of the severed mineral interest—the entity responsible for determining whether or not a statutory use has been made or a statement of claim filed pursuant to the Act.

It is beyond question that the ownership of real estate is a property interest protected by procedural due process. *Terrace* v. *Thompson*, (1923) 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255. As discussed in a prior section in this brief, the Indiana Mineral Lapse Act causes a taking of private property. It has been held by this Court that even a temporary deprivation of a property interest constitutes a taking requiring procedural due process protection. *Fuentes* v. *Shevin*, (1972) 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 556; *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, (1975) 419 U. S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751. While the Indiana Mineral Lapse Act calls the transfer of property a "lapse", it certainly constitutes a significant taking of property within the purview of the due process clause of the Fourteenth Amendment. See *North Georgia Finishing* v. *Di-Chem, supra*, 419 U. S. at 606.

It is one of the most fundamental rights in our system of jurisprudence that before there can be a taking of private property by the state it is necessary that notice and a hearing be given. As was stated by this Court in the case of *Ochoa* v. *Hernandez y Morales*, (1913) 230 U. S. 139, 33 S. Ct. 1033, 57 L. Ed. 1427, on 57 L. Ed. 1427, 1437:

> Without the guarantee of "due process" the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before the Magna Charta was embodied in that charter [2 Coke, Inst. 45, 50], and has been recognized since the revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term "due process of law" all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of pro-

> cedure, and without notice or an opportunity for a hearing.

More recently, beginning with *Mullane* v. *Central Hanover Bank and Trust Company*, (1950) 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865, this Court has again stated the minimum requirements of procedural due process:

> Many controversies have been raised about the cryptic and abstract words of the due process clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case. 339 U. S. at 313.

While this court has held that it may not be necessary to have a predeprivation hearing, there must at least be a prompt postdeprivation hearing to correct any administrative error. See *Mackey* v. *Montrym*, (1979) 443 U. S. 1, 13, 99 S. Ct. 2612, 61 L. Ed. 2d 321, *Matthews* v. *Eldridge*, (1976) 424 U. S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18.

Once it is determined that there has been a taking of the property interest, and that due process protections apply, the inquiry becomes what process is due to protect the erroneous deprivation of that interest. *Mackey* v. *Montrym, supra*, 443 U. S. at 10. There are several factors which have been used by this court to resolve this inquiry:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. *Eldridge*, (1976) 424 U. S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18.

In the present case, the private interest affected by the state legislation is the ownership in fee simple of a mineral estate, the value of which could be quite substantial. The risk of erroneous deprivation of the severed mineral interest under the present statutory scheme is great inasmuch as the entity making the factual determinations is the successor in interest, the very individual who will most directly benefit by the lapse of the mineral interest. Furthermore, it would be of substantial value in preventing an erroneous deprivation of the mineral interest if the person making the determination as to whether a use had been made or a statement of claim filed was a disinterested party. Finally, the fiscal and administrative burden on the government in providing notice and a hearing regarding the lapse of the mineral interest, would be inconsequential in that the present state judicial system and judges could be employed to conduct the hearing. While there are no statistics on the number of severed mineral interests which would be subject to review, it would seem very unlikely that this would place any serious burden on the existing court dockets.

The test set forth in *Matthews* v. *Eldridge, supra,* concerned itself with whether a predeprivation hearing was required by due process, or whether a prompt postdeprivation hearing would suffice. The Mineral Lapse Act provides for no hearing whatsoever, and is therefore far more defective.

The Supreme Court of Indiana in its opinion in this case held that if there was a dispute regarding the facts as to whether a lapse had occurred, notice and a hearing would be provided by resorting to a court for a determina-

tion of the controversy. (Joint Appendix, pages 41 and 42). This court has repeatedly rejected the argument that common law remedies of pretermination injunction or a post-termination suit for damages is adequate for due process purposes. *Memphis Light, Gas and Water Division* v. *Craft, supra,* 98 S. Ct. at 1565-1566, n. 26; *Fuentes* v. *Shevin,* (1972) 407 U. S. 67, 85, 92 S. Ct. 1983, 32 L. Ed. 2d 556. Furthermore, speed and efficiency does not justify abrogation of due process rights. As the Court stated in *Stanley* v. *Illinois,* (1972) 405 U. S. 645, 92 S. Ct. 1209, 31 L. Ed. 551:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. 405 U. S. at 656.

Providing notice and a hearing to the owner of the severed mineral interest prior to the lapse of the interest would not impair the effectiveness of dormant mineral legislation. As previously discussed, the main purpose of the Indiana Mineral Lapse Act is to transfer ownership of severed mineral interest from persons who have left the area and cannot be located to the owner of the interest out of which it was carved, who presumably can be more readily located. However, as the present case indicates, the Indiana Mineral Lapse Act not only transfers the severed mineral interest from owners who have left the area and

cannot be located, but also transfers severed mineral interests from owners who are still living in the area and whose whereabout are known. Edna H. Bobe and Eden H. Pond, the owners of the severed mineral interest in the present case, were both living in an area near the subject property and their addresses were known to the successor in interest, Ulysses G. Walden, Jr., and Carolyn Sallee Walden (Joint Appendix, page 7). Furthermore, Consolidation Coal Company was able to ascertain and locate the owners of the severed mineral interest and obtain a coal lease from them. (Joint Appendix, pages 6 and 7). Therefore, in the present case, the Indiana Mineral Lapse Act — by not providing notice and a hearing to the severed mineral interest owners giving them an opportunity to file a statement of claim or prove that a use had been made within the statutory framework — actually impedes mineral development by creating confusion as to the ownership of the mineral interest.

Irrespective of other constitutional deficiencies, the Indiana Mineral Lapse Act could quite simply be modified to satisfy procedural due process notice and hearing requirements. Essentially, all that need be done is make the notice requirement of section 6 of the Act (Appendix A, page 49) applicable to all severed mineral interest owners. The statute would then provide that every severed mineral interest owner, not just those with ten or more interests, must be given notice — either actual notice, or if their whereabout are unknown, by publication — and they would have sixty days to record a statement of claim after such notice is given. Furthermore, a hearing could be set with the county court sometime after the expiration of the sixty day period in which a determination would be made as to whether a statement of claim was filed or a statutory

use made of the severed mineral interest. This simple statutory change would still accomplish the principal purpose of the statute by transferring severed mineral interests from owners who cannot be located and who have left the area, but at the same time allow a severed mineral interest owner who can be found an opportunity to preserve his interest and/or challenge the lapse of the interest.

D. The Act Is Not Analogous to Remedial Types of Legislation.

In the courts below, the Appellees have argued that the Mineral Lapse Act is analogous to remedial legislation such as statutes of limitation, recording acts and marketable title acts. The Supreme Court of Indiana relied heavily on the analogy of the Mineral Lapse Act with statutes of limitations in support of its finding that the Mineral Lapse Act was constitutional. (Joint Appendix, pages 42 to 45). An examination of other remedial types of legislation reveals the substantial differences which exist between them and dormant mineral statutes.

With regard to statutes of limitation, this Court has noted:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedience rather than principles. They are practical and pragmatic devices. . . .

Chase Securities Corporation v. *Donaldson,* (1945) 325 U. S. 304, 314, 65 S. Ct. 1137, 89 L. Ed. 1628. Statutes of limitations are devices to protect the integrity of the judicial process by excising stale claims and thereby preventing citizens from confronting the unfairness of defending claims long after evidence has disappeared and memories

faded. *Id.;* see also *Levy* v. *Stewart,* (1870) 78 U. S. 244, 11 Wall 244; *United States* v. *Kubrick,* (1979) 444 U. S. 111.[30] A mineral lapse statute cannot be so justified. To the contrary, by making title to a mineral interest depend upon evidence of the level of activity and development of a mineral estate that may be 15-20 years old, and often not of public record, the Indiana Court encourages litigation of factual issues that may be presently difficult to prove. Furthermore, the import of the Mineral Lapse Act is substantive — the transfer of a mineral estate to persons whom the state believes are more likely to develop those resources — rather than procedural. As the Indiana Court admitted, "the Act seeks to remedy a situation thought to retard economic activity vital to the welfare of local communities and the general public as well." (Joint Appendix, page 48). The Michigan Supreme Court made a similar statement in its recent case upholding that State's dormant mineral act:

> None of the provisions of the Act purport to be concerned with the owner's intent to abandon * * * rather, the Act is designed to increase the marketability and development of severed mineral interests

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[30]The Indiana Supreme Court passed over another important distinction between the Mineral Lapse Act and statutes of limitations. The Mineral Lapse Act operates upon a property interest, not a mere cause of action. Under Indiana law, the mineral estate owner has no cause of action that he can pursue against the surface owner. Thus, his failure to file a claim cannot be taken as a waiver of whatever rights he might have against the surface owner. This distinction, which was found to be persuasive by other courts reviewing similar dormant mineral legislation, see *Wilson* v. *Bishop,* (1980) 82 Ill. 2d 364, 412 N. E. 2d 522; *Contos* v. *Herbst,* (Minn. 1979) 278 N. W. 2d 732, 745, was rejected out of hand by the Indiana Supreme Court.

by creating a rule of substantive law. . . . *Bickle* v. *Fairchild*, (1980) 410 Mich. 21, 299 N. W. 2d 704, 713.

Thus, the Indiana statute and other similar mineral lapse acts cannot be saved by analogy to statutes of limitation.

Similarly, Indiana's Mineral Lapse Act is not like marketable title acts or other title recordation statutes. This type of legislation, as with statutes of limitation, serves a narrower purpose and operates on different interest than does the Mineral Lapse Act. Mineral title acts "essentially provide that 'when one person has a clear record title to land for a designated period (which varies from 20-50 years), inconsistent claims or interests which arose before that period are extinguished unless the adverse claimant seasonably records a notice of this claim or interest'." Spies, *Annual Survey of Virginia Law, Property*, 51 Va. Rev. 1621, 1660, n. 61 (1965). See also Anno., 71 A. L. R. 2d 846, "Marketable Title Statutes" (1960). Faced with competing or potentially competing claims to the same property, marketable title legislation removes ancient or technical impediments to title in favor of the owner of clear record title to the same property. Marketable title acts recognize that an ancient adverse claim to property (the Indiana Marketable Title Act, I.C. 32-1-5-1 through 32-1-5-10, designates a period of 50 years) has probably been satisfied or a decision was made not to exercise the contingent adverse claims through litigation. A marketable title act sorts out and decides the claims on an effective basis.[21]

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[21]One of the leading authorities on marketable title legislation has warned against the overly broad application of marketable title principles to inapposite land use problems. *See* P. Bayse, *Clearing Land Titles*, § 216, at 317 (1953).

The Mineral Lapse Act does not purport to decide between competing claims to the same property. The Mineral Lapse Act by interposing requirements for certain forms of mineral extraction activities, registration, and the like, actually *creates* conflicting claims between surface owners and the severed mineral interest owners which would not otherwise arise. Finally, it is clear that the Indiana Act cannot be upheld by reference to simple recording acts. They are justified under essentially the same rationale as marketable title acts. Under a recording act, a subsequent bona fide purchaser's title to property is deemed superior to that of a prior purchaser who failed to record the deed or other instrument evidencing the transaction upon which he bases his claim of ownership. They are intended to protect innocent parties who purchase property. The person purchasing property without actual or constructive notice or knowledge of an adverse claim to the property should not have to take subject to that adverse claim. Moreover, the recording act does not take the entire "bundle of rights" from the prior purchaser; he is left with a cause of action against the seller. Compare *Penn Central Transportation Company* v. *New York City, supra,* 438 U. S. at 137. The Mineral Lapse Act, by contrast, deprives owners of mineral interests of every vestige of ownership.

In sum, Indiana has purported to encourage the development of oil, gas and coal through the taking of private property without observing the procedural and substantive safeguards required by the Constitution. By upholding the legislature's choice of means in this case, the Indiana Supreme Court has "forgotten that a strong public policy to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional

way of paying for the change." *Pennsylvania Coal Company* v. *Mahon, supra,* 260 U. S. at 416.

V. THE INDIANA MINERAL LAPSE ACT IMPAIRS THE OBLIGATIONS OF CONTRACTS BY DESTROYING A VESTED CONTRACTUAL RIGHT.

The Constitution of the United States, Article I, Section 10, states in paragraph 1:

> No state shall . . . pass any bills of attainder, *ex post facto* law, a law impairing the obligations of contracts, or grant any title of nobility.

The Indiana Mineral Lapse Act provides for the transfer of a severed mineral interest from the owner of that interest to the person, or his successors or assigns, who contractually agreed to the original severance of the mineral interest. In the present case, the appellants, Eden H. Pond and Edna H. Bode, in the Warranty Deed dated March 1, 1954, created a severed mineral estate by reservation (Joint Appendix, pages 10 and 11). The Indiana Mineral Lapse Act destroys this contractual reservation by transfering the mineral interest to the very person, or his successors or assigns, who had originally agreed to the severance (Joint Appendix, pages 5 to 7).

In two recent cases this court has reasserted that the contract clause is not without meaning in modern constitutional jurisprudence. In the case of *United States Trust Company* v. *New Jersey,* (1977) 432 U. S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92, this court held unconstitutional a 1974 New Jersey statute which retroactively repealed a 1962 covenant limiting the ability of the Port Authority of New York and New Jersey to subsidize rail transportation with revenue pledged as security for bonds, because it consti-

tuted an impairment of the state's obligation of contract with the bond holders. *Allied Structural Steel Company* v. *Spannaus,* (1978) 438 U. S. 234, 98 S. Ct. 217, 57 L. Ed. 2d 727, rehearing denied 99 S. Ct. 233, involved a Minnesota statute which subjected private employers of 100 or more employees, who provided pension benefits under qualified plans, to a "pension funding charge" upon termination of the plan if the pension funds were not sufficient to cover full pensions for all employees who had worked at least ten years. This court struck down the statute on the basis that it impaired the company's contractual obligation to its employees under the pension agreement with them. Furthermore, the Supreme Court of the State of Nebraska in the case of *Wheelock* v. *Heath,* (1978) 201 Neb. 835, 272 N. W. 2d 768, held that the Nebraska dormant mineral legislation was unconstitutional in part because it violated the contract clause of the United States Constitution.

Under Indiana law, a grant of the right to the coal estate conveys with it as a necessary incident to the right of ownership, the right to use such means and processes for mining and removing the coal from the premises as may be reasonably necessary. *Ingle* v. *Bottoms,* (1902), 66 N. E. 160, 160 Ind. 73. It has also been held under Indiana law that the execution, delivery and acceptance of a deed containing a reservation, constituted a contract between the parties thereto. *City of Elkhart* v. *Christiana Hydraulics,* (1945) 223 Ind. 242, 59 N. E. 2d 353. A reservation in a conveyance, whereby a right is reserved in the grantor, carries with it all the usual and necessary incidents and appurtenances of such right. It carries with it all that is necessary for the beneficial use and full enjoyment of such reserved right. *City of Elkhart* v. *Christiana Hydraulics, supra,* 59 N. E. 2d at 357. Applying these principles to the

present case, when Eden Pond and Edna Bobe reserved the minerals under the subject property in the deed of March 1, 1954, they also reserved implied rights that were necessary for the beneficial use and enjoyment of the mineral reservation. The deed with the reservation constituted a contract between Edna Bobe and Eden Pond, Grantors, and Ulysses Grant, and the successors and assigns of Ulysses Grant, as Grantees, with certain on-going and continuing obligations. The Indiana Mineral Lapse Act by causing the severed mineral interest to revert to the owner of the interest out of which it was carved totally destroys the reservation and the rights appurtenant thereto.

While this Court has held that it is customary in reviewing economic and social regulations for courts to defer to the judgment of the legislature as to the reasonableness and necessity of the legislation, private contracts are not subject to unlimited modification under the police power. *United States Trust Company* v. *New Jersey,* (1977) 431 U. S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92, at 109. While this Court recognized in *Allied Structural Steel Company* v. *Spannaus,* (1978) 438 U. S. 234, 98 S. Ct. 2716, 57 L. Ed. 727, that a state's exercise of its police power is paramount to any rights in the contracts between individuals, it noted:

> If the contract clause is to retain any meaning at all . . . it must be understood to impose some limits upon the power of a state to abridge existing contractual relations, even in the exercise of this otherwise legitimate police power. 438 U. S. at 242.

Before examining the extent of the limits placed upon the state's power to abridge existing contractual relationships, a preliminary determination that a contract has been technically impaired is necessary. *Home Building and*

Loan Association v. *Blaisdell*, (1934) 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413. This seems to be easily satisfied in the present case in that the mineral reservation, and its appurtenant rights, are not only impaired, but destroyed. The next step in the inquiry was set out in *Spannaus, supra*, 438 U. S. at 244-245:

> In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

After a severe impairment of the contract is found, a careful examination of the nature and purpose of the state legislation is necessary. *Spannaus, supra*, 438 U. S. at 245. Five significant factors were set forth in the case of *Home Building and Loan Association* v. *Blaisdell, supra*, 290 U. S. at 245-247, regarding whether the legislation constitutionally impairs contracts. These factors were also utilized by this Court in *Spannaus, supra*, 438 U. S. 242. These factors are: (1) whether there was an emergency need for the state legislation; (2) whether the legislation was enacted to protect a basic societal interest and not merely a favored group; (3) whether the relief was appropriately tailored to the emergency that it was designed to meet; (4) whether the conditions imposed were reasonable; and (5) whether the legislation was limited to the duration of the emergency.

Applying the above factors, this Court in *Spannaus, supra*, 438 U. S. at 248-249, found that the state law in

question was not enacted to protect a broad societal interest but rather a narrow class. It also found that the legislation imposed "a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees" without the desperate emergency economic conditions of the 1930's.

Application of the court's reasoning in *Spannaus* to the Indiana Mineral Lapse Act in the present case leads to the conclusion that the Act cannot withstand scrutiny under a contract clause analysis. As in *Spannaus,* the Mineral Lapse Act substantially alters the contractual relationship between the record owner of the mineral interest and the owner of the surface estate, by superimposing obligations upon the mineral interest owner beyond those he had voluntarily agreed to undertake. Since the Indiana Mineral Lapse Act effectively extinguishes traditional contractual rights upon which individuals have placed great reliance in the ordering of their business and personal affairs, the "height of the hurdle" which this legislation must clear is quite substantial. As in *Spannaus,* the impairment imposes heavily on legitimate contractual expectations, which expectations did not include the substantial changes which the Indiana Mineral Lapse Act caused.

In line with this court's emphasis in the *Spannaus* case on the owner's reasonable reliance on legitimate contractual expectations, *Id.* 438 U. S. at 246, the Indiana Mineral Lapse Act destroys the reasonable expectations of the parties to the original conveyance by retroactively imposing obligations which neither party intended to be a part of the contractual arrangement. There is nothing in the legislative history which indicates that the Act was meant to serve an emergency need. It should be pointed out that the Act was passed in 1971, which was prior to the energy crisis

created by the oil shortage in 1973. Furthermore, the nature and the purpose of the Indiana Mineral Lapse Act does not justify the severe impairment of contractual rights which the Act causes. As can be seen by the present case, the Indiana Mineral Lapse Act does not only serve to transfer severed mineral interests from owners of the severed minerals who cannot be located, but also serves to transfer mineral interests from persons whose whereabouts are known and can easily be located. The Indiana Mineral Lapse Act destroys private property rights, which constitute a basic societal interest, in favor of a limited class of surface owners who otherwise possess no claim or right to the mineral estate. Certainly, the nature and purpose of this legislation cannot justfy this severe impairment of contract.

VI. THE INDIANA MINERAL LAPSE ACT MAKES A CLASSIFICATION WHICH DEPRIVES ONE CLASS OF BASIC CONSTITUTIONAL RIGHTS WHICH IS ALSO ARBITRARY AND CAPRICIOUS

The Fourteenth Amendment to the United States Constitution states in Section 1:

> No state shall . . . deny to any person within its jurisdiction equal protection of the law.

As previously discussed in this brief, the Indiana Mineral Lapse Act makes no mandatory provision that notice be given to the owner of the severed mineral interest regarding the lapse of the mineral interest. However, Indiana Code 32-5-11-5, (Appendix A, page 48) being Section 5 of the Indiana Mineral Lapse Act, makes an exception to the general absence of any notice requirement by requiring that notice of the lapse of the mineral interest be given to

a special class of mineral interest owners to foreclose the availability of a special remedy available only to that class. Essentially, this exception provides that any owner of ten or more mineral interests in a given county, who has filed a statement of claim with respect to one or more of such interests but who inadvertently fails to preserve one or more of its interests, has sixty days after the giving of the statutory notice of the lapse of the mineral interest in which to file a claim to preserve the interests. Therefore, the Indiana Mineral Lapse Act creates a classification which favors a special interest group by requiring that, in certain situations, they be given notice and an opportunity to file a statement of claim prior to the lapse of their interests. This small group, singled out by the legislature, is provided due process protection which enables them to protect their property and contractual interests, while denying similar protection to all the other severed mineral interest owners who are in equal need of such protection.

This court has stated that when a state statutory classification approaches sensitive and fundamental rights, strict scrutiny will be used to examine such legislation. *Tremble* v. *Gordon*, (1977) 430 U. S. 762, 97 S. Ct. 1459, 62 L. Ed. 2d 31. In *Stanley* v. *Illinois*, (1972) 405 U. S. 645, 92 S. Ct. 1209, 31 L. Ed. 2d 551, this court held that a statute which deprived an unwed father of a hearing on his fitness as a parent while extending this protection to all other parents whose custody of their children is challenged, violated the equal protection clause of the Fourteenth Amendment. *Id.* 405 U. S. at 649. The Indiana Mineral Lapse Act by depriving a large class of severed mineral interest owners of a basic right to be notified of the taking of their property, and by depriving them of an opportunity to challenge that taking or take affirmative action to prevent it—while offer-

ing such procedural due process protection to a select group—violates the equal protection clause of the Fourteenth Amendment.

Even if this court would view the classification in the Mineral Lapse Act as being in the category of social and economic legislation, thereby only requiring that the legislation not be arbitrary and capricious, *U. S. Railroad Retirement Board* v. *Fritz*, (1980) ____ U. S. ____, 101 S. Ct. 453, 66 L. Ed. 2d 368; *New Orleans* v. *Dukes*, (1975) 427 U. S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511, the Indiana Mineral Lapse Act would still fail to meet this low level of scrutiny.

The reason this exception was placed in the Indiana statute was because representatives of coal companies who were asked to participate in the drafting of the statute objected to any provisions which would automatically terminate their interests due to inadvertent failure to file a statement of claim. It was contended that their interests were often very complex and based upon documents of great antiquity. The major mineral owners were afraid that they might inadvertently fail to file a statement of claim even though they had made a diligent effort to do so. See Polston, *Legislation, Existing and Proposed, Concerning Marketability of Titles*, 7 Land and Water Law Review 73, at pp. 100-101. Therefore, this exception which appears in the Indiana Mineral Lapse Act was in response to the efforts of a particular group, who were in no greater need of protection than the other members of the class. In fact, large mineral interest owners who have substantial capital and personnel to keep abreast of legislation affecting their mineral interests are in far greater position to protect their interests than individual mineral interest owners, who often may not even be aware of the existence of the Mineral

Lapse Act. Furthermore, the purpose of the Indiana Mineral Lapse Act, being the promotion of the development of the mineral interest by identifying and locating the owners of the mineral interest, would best be served by giving prior notice to all mineral interest owners along with an opportunity for them to protect their rights by filing a statement of claim before the lapse becomes final. It would seem that the administrative inconvenience involved would be minimal. It is evident that this classification in the Mineral Lapse Act is arbitrary and capricious in that it gives special treatment to members of a favored class who are in no greater need of such protection than other members of the class.

CONCLUSION

For the reasons set forth in this brief, it is respectfully requested that the Indiana Mineral Lapse Act be declared unconstitutional and null and void insofar as it pertains to the Appellants, and that the decision of the Indiana Supreme Court be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

(Compiler's additions shown in bold face type)

32-5-11-1 [46-1808]. Lapse of mineral interest — Prevention. — Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11-5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved. **[IC 32-5-11-1, as added by Acts 1971, P. L. 423, § 1.]**

32-5-11-2 [46-1809]. Mineral interest — Definition. — A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals. **[IC 32-5-11-2, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-3 [46-1810]. Use of mineral interests — Definition. — A mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument. **[IC 32-5-11-3, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-4 [46-1811]. Statement of claim — Filing — Requirements. — The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty-year period set forth in section two **[one]** [32-5-11-1] or within two [2] years after the effective date **[September 2, 1971]** of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed. **[IC 32-5-11-4, as added by Acts 1971, P.L. 423, § 1; 1972, P.L. 11, § 15.]**

32-5-11-5 [46-1812]. Extinguishment of mineral interest — Exceptions. — Failure to file a statement of claim within the time provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) Was at the time of the expiration of the period provided in section four [32-5-11-4], the owner of ten [10] or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) Made diligent effort to preserve all of such interests as were not being used, and did within a period of ten [10] years prior to the expiration of the period provided in section four [32-5-11-4] preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) Failed to preserve such interest through inadvertence, and;

(4) Filed the statement of claim herein required, within sixty [60] days after publication of notice as provided in section seven [32-5-11-7] herein, if such

notice is published, and if no such notice is published, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed. **[IC 32-5-11-5, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-6 [46-1813]. Successor in interest — Notice requirements — Prima facie evidence. — Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten [10] days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, tht such notice was given. **[IC 32-5-11-6, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-7 [46-1814]. Statement of claim — Filing — Recorder's duty. — Upon the filing of the statement of claim, provided for in section 4 [32-5-11-4] of this chapter or the proof of service of notice as provided in section seven **[six]** [32-5-11-6] of this chapter in the recorder's office for the county where such interest is located, the recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice. **[IC 32-5-11-7, as added by Acts 1971, P.L. 423, § 1.]**

32-5-11-8 [46-1815]. Waiver of chapter's provisions — Time Limit. — The provisions of this chapter may not be waived at any time prior to the expiration of the twenty [20] year period provided in section 1 [32-5-11-1]. **[IC 32-5-11-8, as added by Acts 1971, P.L. 423, § 1.]**